S.B.Civil Second Appeal No.307/2006.

Yashwant Kumar.

vs.

Chhogalal and others.

Date : 24.4.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.RS Mankad, for the appellant.

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Heard learned counsel for the appellant/defendant no.5.

The plaintiff filed a suit for injunction claiming the land in question as lane. Defendants Ganesh Lal and Smt. Kasturi filed a counter claim claiming their ownership on the basis of sale deed of 1996. Another defendant Pyara filed a counter claim claiming his ownership by the sale deed executed in favour of his father. Yet another defendant Yashwant Kumar – present appellant, who purchased the property in dispute from Pyara, also filed counter claim claiming title as derived from Pyara.

The trial court held that Ganesh Lal and Smt.

Kasturi are owners of the property in dispute and on the basis of the said finding, the trial court dismissed the suit of the plaintiff Chhogalal. The trial court also dismissed the counter claim of Yashwant Kumar and Pyara. Hence, first appeals were preferred by Yashwant Kumar (CAD No.81/01) and Chhogalal (CAD No.83/01). Both these first appeals were dismissed by the first appellate court vide judgment and decree dated 17.12.2005 and the finding recorded by the trial court was upheld. Meaning thereby, the property was held to be of Ganesh Lal and Smt. Kasturi.

Hence, this second appeal by appellant Yashwant Kumar.

Learned counsel for the appellant submitted that Pyara's father purchased the suit property in the year 1969 by the sale deed. That sale deed was not cancelled and nobody sought to cancel the same. By virtue of that, Pyara's father and after his death, Pyara succeeded to his property. Pyara sold the property to the present appellant Yashwant Kumar, therefore, Yashwant Kumar became owner of the property. Without any challenge to the sale deed of the year 1969, the sale deed of Ganesh Lal of the year 1986 could not have been recognized and, therefore, two courts below committed error of law in declaring Ganesh Lal as owner

of the property. It is also submitted that in fact, Pyara was in possession of the suit property and thereafter, the present appellant purchased the property and came into possession of the suit property and, therefore, also, both the courts below committed serious error of law in denying the relief to Pyara and consequently, to the present appellant.

I considered the submissions of learned counsel for the appellant and perused the reasons given by the two courts below.

It will be worthwhile to mention Chhogalal filed suit for injunction and in that suit for injunction, counter claims were filed by Ganesh Lal and Smt. Kasturi, by Pyara and by present appellant Yashwant Kumar. Ganesh Lal claimed his possession over the suit property as well as title of the suit property on the basis of sale deed of the year 1986.

Two courts below concurrently found that Ganesh Lal and Smt. Kasturi are in possession of the suit property and were in possession at the time of the sale executed in favour of Yashwant Kumar, therefore, the plaintiff is not entitled to any relief. By this finding, two courts below also held that Pyara was not in possession of the suit property and admittedly in

the counter claims filed by Pyara and Yashwant Kumar, the only relief claimed is that they be declared owners of the property. In substance, counter claim was for declaration only without consequential relief of possession.

So far as finding of possession of Ganesh Lal over the suit property is concerned, there appears to be no illegality and when Ganesh Lal has sale deed in his favour and when Ganesh Lal is in possession of the suit property, then neither Pyara nor Yashwant Kumar could have got the relief of mere declaration that they are owners of the property. Otherwise also, since 1969, the sale deed alleged to have been executed in favour of Pyara's father, by the time of 1986, more than 12 years have already passed and, therefore, the fact of possession of Pyara's father, if it had been there in the year 1969, that was absolutely irrelevant. Since the two courts below have carefully considered all aspects of the matter on the basis of evidence produced on record and in view of the legal position that mere suit for declaration without consequential relief of possession is not maintainable. Defendant Pyara could not have sought relief of declaration without proving his possession also.

In view of the above, I do not find any

substantial question of law involved in this appeal. Consequently, this second appeal, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya